



Duty of police to protect witnesses and other individuals at risk— key human rights considerations

QUICK REFERENCE

Which Articles from the ECHR might I need to consider?

- Article 2 – Right to life

What is the relevant case law?

- Van Colle [2007] EWCA Civ 325
- Osman v UK (2000) 29 EHRR 245

This guidance provides a summary of the key Human Rights Act considerations in respect of witnesses and others who are at serious risk from the criminal acts of others.

General considerations

Where the state authorities (which will usually be the police, but could also include the Prison Service and the Security Services) knew, or ought to have known, of the existence of a real and immediate risk to the life of an individual, the state has a positive obligation under Article 2 to take measures to protect that individual.

Witnesses are in a special category of persons and are entitled to greater protection from the state than members of the public generally.

Article 2 provides:



(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

(2) Deprivation of life shall not be regarded as inflicted in contravention of this Article where it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 2 imposes a positive duty on the state not only to refrain from activity that breaches these rights but, in certain circumstances, to take positive steps to prevent any breach of these rights by third parties.

Article 2 not only obliges the state to refrain from the unlawful taking of life, but also to take appropriate steps to protect the life of those within its jurisdiction. This goes beyond putting in place an effective criminal justice system. Article 2 means that in certain, well-defined, circumstances there is a positive obligation on the state authorities (primarily the police) to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another person.

Duty to Protect - Article 2 obligations where person at risk is not a witness

The key decision which sets out the general position is the case of *Osman*. The Osman family were subject to a series of threats and intimidation that eventually led to a murder. The victim was not, however, a witness but simply a member of the community whose family had been harassed by an individual. The judgment established the following:

- Not every claimed risk to life places a positive obligation on the state under Article 2.
- This would impose an impossible or disproportionate burden on authorities such as the police.
- There could be circumstances, however, where the state did have a positive obligation to protect the person's life, but it was necessary to be able to show



a **real and immediate risk** to that person's life and that the authorities knew (or ought to have known) of this.

- In such cases, a failure by the state to take measures which are available to them and which might have protected the person, could be a violation of the person's rights under Article 2.

Duty to Protect - Article 2 obligations where person at risk is a witness

The recent case of *Van Colle* clarified the position in respect of persons who are witnesses and who are at risk.

In *Van Colle* the victim was due to be a witness in a trial for theft. He received numerous serious threats from the defendant which he relayed to the police. The police, however, took no steps to protect the witness, nor did they arrest the defendant for witness intimidation, nor seek his remand as a result of the threats he had made. The victim was murdered by the defendant before the theft trial came to court.

The court found that the police had violated the victim's Article 2 rights by failing to take any steps to protect him. Indeed, Hertfordshire police had an appropriate witness protection policy in place, but the officer dealing with the victim's case had no knowledge of this. The court found that the police knew, or should have known, that there was a real and immediate risk to the victim's life and that they failed to take measures that were readily available to them and which, judged reasonably, might have protected the victim. The question of whether there was a "real and immediate" risk to the victim had to be considered in light of the fact that he was a witness for the prosecution in a criminal trial, and not simply a member of the community.

The court did not consider that the effect of this was to impose a disproportionate or unrealistic burden on the police, nor that it would "open the floodgates". Hertfordshire police had in place a protocol on witness protection which was based on the ACPO Guidance on the subject, but the officer who dealt with the case was unaware of this and had received no instruction or training on the matter. The court's view was that, rather than placing any new burdens on the police, it was merely a matter of the police following their own policies and procedures.

The judgment clarified that:

- The police have a duty to protect witnesses.



- Witnesses fall into a special category of persons who are entitled to a greater degree of protection from the police than members of the public generally.
- Where on the facts of a case, there is a risk to the life of a witness, then it meets the criteria of being “**real and immediate**” as outlined in the *Osman* case.
- In such circumstances the police, if they know of the risk (or ought to have known) are then under an obligation to take measures reasonably open to them to protect the witness.
- The greater the failure to take any measures that were reasonably open to the police to reduce the risk to the witness, the more likely it is that the police will breach the witness’ rights under Article 2 (and Article 8 where the witness has a family).

